

PUBLIC SERVICE COMPANY OF COLORADO
KOCH INDUSTRIES, INC.

IBLA 81-437

Decided November 17, 1982

Appeal from decision of Colorado State Office, Bureau of Land Management, denying protest of establishment of wilderness study area. CO-070-066.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness --
Wilderness Act

A decision to establish a wilderness study area pursuant to sec. 603(a) of the Federal Land Policy and Management Act of 1976, is proper absent a showing of compelling reasons requiring modification or reversal. Arguments that the area is affected by outside industrial and commercial activity do not preclude further study of the area's fitness for wilderness classification in the absence of proof that the intrusions by man are so great as to prevent the possibility of wilderness classification.

2. Federal Land Policy and Management Act of 1976: Wilderness --
Wilderness Act

Arguments which question the ultimate best use of a proposed wilderness study area for wilderness purposes are prematurely raised at the intensive inventory stage of agency review.

APPEARANCES: Timothy J. Flanagan, Esq., for appellant Public Service Company of Colorado; Robert D. Buettner, Esq., for appellant Koch Industries, Inc.; Dale D. Goble, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINIONBY: ARNESS

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On November 14, 1980, the Colorado State Director, Bureau of Land Management (BLM), published his final intensive wilderness inventory decision designating Colorado wilderness study areas (WSA), pursuant to section 603(a) of the Federal Land Policy and Management Act 1976 (FLPMA), Act of Oct. 21, 1976, 90 Stat. 2785, 43 U.S.C. § 1782(a) (1976). (43 FR 75584 (Nov. 14, 1980)). Included in his decision was the WSA designation of the Little Bookcliffs Wildhorse Area, inventory unit CO-070-066 (Wildhorse). Appellants Public Service Company of Colorado (Company) and Koch Industries, Inc. (Koch), timely protested the designation of the Wildhorse area. Both protests were rejected by BLM on February 2, 1981. On February 27, 1981, Company filed an appeal from the adverse decision received. On March 9, 1981, Koch also filed timely notice of appeal. Both appellants request evidentiary hearings. Examination of the entire record on appeal in relation to the statements of reasons in support of appeal filed by each appellant indicates an evidentiary hearing will not facilitate decision of the appeals. The Board finds the record as constituted to be adequate to permit decision. Accordingly, the requests for evidentiary hearings are denied.

The Wildhorse area, as originally inventoried, contained 43,600 acres. During intensive inventory of the area to determine whether it contained roadless lands having wilderness characteristics, it was determined an alternative lesser area within the original tract comprising 26,525 acres should properly be designated a WSA. Koch, in its statement of reasons, incorporates its earlier protest to the designation of the Wildhorse area for further study, based primarily upon a study furnished by NUS Corporation which assumed a study area of 43,600 acres. Comparison of BLM inventory maps of the Wildhorse area with appellants' specific objections to the further study of the land for possible inclusion in the wilderness system reveals specific objections by Koch to manmade structures were resolved when the land containing those features was deleted from further study. The Colorado State Director, noted this defect in the protest in his decision dated February 2, 1981, at page 1:

[T]he major part of our disagreement is based on your consultant's misunderstanding of the unit's boundaries. The boundaries shown on NUS Corporation's maps submitted to BLM were based on the Final Initial Wilderness Inventory publication of August 1979. These boundaries were based on in house data with no field inventory. The intensive inventory on CO-070-066 was completed in the fall of 1979. The Proposed Wilderness Study Areas publication released in February, 1980 reflected the finding of this field inventory and analysis. Boundaries were pulled back to exclude significant imprints of man. Almost all of the imprints of man enumerated in NUS's report were excluded from the unit. These boundaries remained unchanged in the November, 1980 BLM Final Wilderness Inventory report. Only two short sections of ways still enter the unit from the northern boundary; these ways

which are each less than 1/2 mile long, are unconstructed and considered to have a minimal impact on naturalness. The way entering Main Canyon has not been constructed nor has it been maintained. It is not considered to have a significant impact on naturalness.

Koch's specific objections to works of man which are now outside the designated area are, therefore, no longer relevant to this appeal, except to the extent they comprise part of the nearby sights and sounds which both appellants argue detract from the wilderness character of the Wildhorse area.

Koch also objected that the reduced area proposed to be studied was not truly a contiguous unit, because of a deep corridor at the north end of the area made to exclude a road leading to a gas well. Koch argued that the proximity of oil and gas activities and other commercial pursuits made the Wildhorse area unsuitable for wilderness purposes, and, in any event, BLM had made internally conflicting evaluations of the area in its evaluation of wilderness characteristics, which invalidated the agency conclusion that the reduced area possesses wilderness value. The statement of reasons filed by Company also incorporates its earlier protest to BLM. Company objects generally that the proposed WSA lacks opportunities for solitude and recreation, contains fences and roads used in connection with grazing activities, is subject to mineral development and is within sight and sound of mining, power generating, and commercial and transportation facilities which impair the wilderness character of the land. Company also argues that the designation of the Wildhorse area as a WSA overlooks the value of the area for expansion of existing power facilities and is unlawful, citing Rocky Mountain Oil and Gas Association v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), appeal docketed, No. 81-1040 (10th Cir. Jan. 5, 1981), Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980), and an unspecified "new" Departmental energy policy (Company's Statement of Reasons at 2).

Koch's arguments are answered in detail by the February 2 decision denying Koch's protest which explains:

You also protest my decision to leave in the upper part of Main Canyon. This was evaluated very carefully. Although the upper canyon is connected only by a narrow neck, it is connected topographically (continuous canyon). Much of the travel in this unit is on the canyons' floors. Physical access into upper Main Canyon from the lower canyon is not restricted, although the unit's boundary extends to the canyon rims. The vertical separation of the canyon floor and rim diminish the effect this boundary constriction would have on opportunities for solitude and primitive recreation. Based on the rationale provided in the BLM Final Intensive Inventory publication, we believe there are outstanding opportunities for solitude and primitive and unconfined recreation in upper Main Canyon and its side canyons. Upper Main Canyon forms part of an extensive canyon system that makes up this unit; it cannot be considered separately in the

wilderness review. Also, it should be noted that the absence of wild horses in the northern portion of the unit does not disqualify it from having outstanding primitive recreation opportunities because these opportunities are based on a variety of values such as scenery and geologic features which are present in the northern area.

Examination of the WSA map and the intensive inventory report prepared by BLM supports this analysis. The February 2 decision continues to address the remainder of Koch's arguments as follows:

It is during the study phase that the BLM through its regional land use planning system will determine if the Little Bookcliffs Wildhorse Wilderness Study Area is suitable or unsuitable for recommendation to Congress as wilderness. It is also during the study phase that other resource values such as oil and gas development and their conflicts are analyzed. As you are aware, BLM's Interim Management Policy and Guidelines governs the management of oil and gas activities during wilderness review.

You have also stated that we have contradicted our own reports, specifically, the unit's Situation Evaluation of February 21, 1979. I would like to point out that the inventory review involved both an initial inventory and an intensive inventory. The initial inventory was based on limited, in office data. Your reference to BLM changing their conclusions about the qualifications of part of the northern area came about through careful field examination.

[1] The record establishes that the BLM decision on appeal was made pursuant to section 603(a) of FLPMA, supra, which requires the Secretary of the Interior to review the public lands and to identify roadless areas of 5,000 acres or more which possess wilderness characteristics as defined by the Wilderness Act of September 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131(c) (1976). The review is to be made for the purpose of recommending to the President concerning the suitability for wilderness classification of the roadless areas. Congress shall make the final determination whether the land shall be included in the national wilderness system. See 43 U.S.C. § 1782 (1976); Utah v. Andrus, 486 F. Supp. 995, 1003 (D. Utah 1979). The decision under review proposes to study the Wildhorse area based upon a preliminary finding that it meets the basic criteria of the Wilderness Act, supra. Neither appellant has shown how the decision complained of is in error. The failure to do so is fatal to their appeals. Richard J. Leumont, 54 IBLA 242 (1981); Sierra Club, 54 IBLA 31 (1981). Further, in the February 2, 1981, decision denying Company's protest, the following description of the general nature of the Wildhorse area is advanced by BLM:

The number of canyons in conjunction with their multibranded nature contains a large network of places where people can disperse throughout the unit, thus minimizing the probability

of encountering others. There are approximately 32 miles of traversable canyons within the unit. In addition, the gently twisting nature of the canyons limits the views to relatively short distances, which adds to the ability to become separated from others within the same canyon. Additionally, outstanding opportunities for solitude in the uplands is a result of a combination of rolling topography and benching together with the vegetative screening. Much of the upland area consists of dense pinyon-juniper woodland.

These findings concerning the existence of outstanding opportunities for solitude and naturalness are consistent with the definition of wilderness contained in the Wilderness Act. See 16 U.S.C. § 1131(c) (1976). Nothing in the submissions made by either appellant contradicts the assessment by BLM. Involving, as it does, a discretionary decision, the BLM determination is entitled to great deference by this Board. Conoco, Inc., 65 IBLA 84 (1982); Koch Industries, Inc., 62 IBLA 45 (1982).

[2] The tentative nature of the decision on appeal must also be recognized. The BLM wilderness review is conducted in a series of administrative steps comprised of inventory, study, and reporting. The decision here on appeal merely marks the beginning of the study whether to recommend favorably to the President concerning the wilderness character of the Wildhorse area. City of Delta, 66 IBLA 282 (1982); Union Oil Co. (On Reconsideration), 58 IBLA 166 (1981). The record on appeal demonstrates unequivocally that the Wildhorse area exceeds 5,000 acres in extent, is roadless, and possesses generally the wilderness characteristics described in the Wilderness Act codified at 16 U.S.C. § 1131(c) (1976). The remaining arguments on appeal do not directly challenge this preliminary finding, but rather look to the ultimate determination to be made. Thus, the question which arguments directed to competing uses and neighboring activities raise is whether the ultimate best use of the Wildhorse area is for wilderness purposes. That question is premature at the inventory stage in agency review. See the discussion in Utah v. Andrus, *supra* at 1003. A review of the entire record indicates BLM has given preliminary consideration to the outside sights and sounds which appellants complain diminish the wilderness aspect of this area. The record does not, however, indicate the outside activity of man is so extremely imposing it cannot be ignored. In the absence of such a showing at this state of review, the agency determination to proceed to the next step of wilderness review process is not erroneous. See Mitchell Energy Corp., 68 IBLA 219 (1982).

Finally, Company's reliance upon Rocky Mountain Oil and Gas Association, *supra*, and Mountain States Legal Foundation v. Andrus, *supra*, is misplaced. While the cited opinions contain dicta relevant to the issue presented here on appeal (whether the Department correctly decided to continue to study the Wildhorse area), none of the cited authority is controlling. For example, in Mountain States the court found that failure by the Department to act upon pending oil and gas lease applications had continued to the point where "administrative delay amounts to a refusal to act, with sufficient finality

and ripeness to permit judicial review." 499 F. Supp. at 396. The court held it could assume jurisdiction under the circumstances described and found the Secretary to be in violation of 43 U.S.C. § 1702(j) (1976) (499 F. Supp. at 397). The Rocky Mountain opinion holds that the Secretary of the Interior acting in reliance upon section 603 of FLPMA, cannot ban mineral exploration before 1984 in areas under review for wilderness classification.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

Anne Poindexter Lewis
Administrative Judge

Bruce R. Harris
Administrative Judge

